Supreme Court, U.S.
FILED
JUL 22 1998
OFFICE OF THE CLERK

No. 97-2067

In The

Supreme Court of the United States

October Term, 1997

ERNEST A. OLIVER,

Petitioner,

vs.

HYDRO-VAC SERVICES, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ISSUE PRESENTED FOR REVIEW

Respondents submit that the questions presented, as phrased by Petitioner, were never presented in the lower courts. Respondents submit a proper statement of the issue to be:

1. Was Petitioner's Motion to Set Aside Orders untimely under Fed. R. Civ. P. 60(b)(3)?

2. Was Petitioner's Motion to Set Aside Orders pursuant to the savings clause of Fed. R. Civ. P. 60(b), supported by clear and convincing evidence of fraud on or by the court?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Neither Hydro-Vac Services, Inc. nor Golden Gallon, Inc. has a subsidiary or parent.

TABLE OF CONTENTS

	Page
Issue Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citaitons	iv
Statement of the Case	1
Statement of Facts	2
Argument	4
Standard of Review	4
1. Petitioner's appeal is untimely under Fed. R. Civ. P. 60(b)(3).	5
2. Petitioner's Motion pursuant to the savings clause of Fed. R. Civ. P. 60(b), was unsupported by evidence of fraud on or by the court and the Motion was properly denied.	5
Reasons for Denying the Writ	8
Conclusion	9

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Amerinational Industries, Inc. v. Action-Tungsram, Inc., 925 F.2d 970 (6th Cir. 1991) 5

Browder v. Dept. of Corrections, 434 U.S. 257, 98 S. Ct. 56 (1978) 4

DeVito v. Fidelity and Deposit Company of Maryland, 361 F.2d 936 (7th Cir. 1966) 7

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S. Ct. 997 (1944) 6, 7

Hines v. Royal Indemnity Co., 253 F.2d 111 (6th Cir. 1958) 7

Mallory v. Eyrich, 922 F.2d 1273 (6th Cir. 1991) 5

United States v. Twitty, 44 F.3d 410 (6th Cir. 1995) .. 7

Windsor v. U.S. Dept. of Justice, 740 F.2d 6 (6th Cir. 1984) 5

Statutes Cited:

42 U.S.C. § 1983 1

42 U.S.C. § 6972 1

Contents

Page

Rules Cited:

Federal Rule of Civil Procedure 60 ..... 2, 8

Federal Rule of Civil Procedure 60(b) ..... i, 4, 5, 6

Federal Rule of Civil Procedure 60(b)(3) ..... i, 5

Supreme Court Rule 10 8

Other Authorities Cited:

11 C. Wright and A. Miller, Federal Practice and Procedure § 2860 6

11 C. Wright and A. Miller, Federal Practice and Procedure § 2870 6

STATEMENT OF THE CASE

This Petition is the last gasp of one of four cases commenced by Petitioner Ernest Oliver ("Petitioner") based on events occurring during and following his five months of employment with Respondent Hydro-Vac Services, Inc. ("Hydro-Vac") in 1990. Petitioner's first claim against his former employer, Hydro-Vac, was brought pursuant to the whistleblower provisions of a variety of federal environmental statutes, before the U.S. Department of Labor, under docket number 91-SWD-00001 ("the Labor Action") on September 24, 1990. A decision in the Labor Action was entered February 5, 1998, from which no appeal was taken by either party. This action, CIV 1-91-0354, (U.S.D.C., E.D. TN) ("the Federal Action"), was commenced on August 26,1991, and asserted claims under 42 U.S.C. § 6972 (sic), 42 U.S.C. § 1983 and common law conspiracy (R. 1). Respondent Bill Foxworth is the President of Hydro-Vac, Respondent Golden Gallon, Inc., was a customer of Hydro-Vac and Respondent Guy Moose is a state regulatory officer with authority over Hydro-Vac. There were approximately eighty other defendants in the Federal Action who were never served with summons. Simultaneous to the filing of the Complaint in the Federal Action, Petitioner commenced an action in Tennessee state court, against the same parties, under docket number 91-CV-1711 ("the State Court Action"). The State Court Action contained claims identical to the claims under 42 U.S.C. § 1983 and common law conspiracy as contained in counts two and three of the Federal Action and contained no other claims. The State Court Action was dismissed for lack of subject matter jurisdiction, which dismissal was not appealed by Petitioner. In the fourth action, Petitioner brought claims against multiple Defendants, claiming that certain Defendants had not re-hired Petitioner as a result of age and sex discrimination, and that certain other Defendants, including some counsel of record in the Federal Action and one Respondent herein, had engaged in a conspiracy to affect Petitioner's employment, under docket number 1:96-CV-380 (U.S.D.C., E.D. TN.) ("the EEOC Action"). The EEOC Action was dismissed on the merits,

was appealed by Petitioner, and said Appeal was dismissed by Petitioner.

After the Federal Action was filed, summons were issued and served on only four of eighty-five Defendants as of December 31, 1991. These four Defendants, Respondents herein, filed Motions to Dismiss, Alternative Motions for Summary Judgment, and Motions for Sanctions, not later than January 29, 1992 (R. 2, 9, and 12). Petitioner, through his then counsel, responded at various times thereafter, and was granted additional time to respond when such request was made of the trial court (R. 16, 18-21, 28, 34). By Order of August 10, 1992 (R. 56), Petitioner's action was dismissed and a hearing on sanctions was scheduled. A Final Order entering sanctions was entered December 28, 1992 (R. 99), following the hearing on December 16, 1992. The Orders of August 10, 1992, and December 28, 1992, were supported by lengthy Memorandum Opinions of the trial judge, neither of which was published. (App. 5 and R. 98 respectively). No appeal was initiated.

Nothing was done in the Federal Action until January 22, 1997, when Petitioner filed his Motion to Set Aside Orders pursuant to Fed. R. Civ. P. 60, seeking a set aside of the Orders of August 10, 1992, and December 20, 1992 (*sic*, the Record shows no Order of that date), and December 28, 1992 (R. 101). The Motion was supported by a Memorandum of Law and seven exhibits, but included no affidavits or other sworn testimony (R. 102). The Motion was denied January 31, 1996, and Petitioner filed a timely Notice of Appeal to the Court of Appeals for the Sixth Circuit. Following briefing, the Court Appeals for the Sixth Circuit affirmed the Trial Court's action by Order entered March 23, 1998 (App. 1).

STATEMENT OF FACTS

Respondents cannot unravel or dissect Petitioner's statement of facts and cannot address all of the perceived misstatements of fact or law in the petition within the applicable page limitations.

Petitioner's statement of facts excerpts incomplete portions of the record from the Federal Action, the State Action, the Labor Action, and the EEOC Action, and contains factual assertions which are neither a part of the record in this action nor supported by appropriately authenticated documents and sworn testimony. His allegations of ". . . a conspiracy . . . so large as to infect the Tennessee State and Federal Court systems, the FBI, the Department of Justice, and offices of U.S. Attorney General Janet Reno, Vice-President Albert Gore, Jr., and the Clinton Administration" are so speculative and unsupported by any factual material that they do not warrant a response (Petition at 7). Therefore, Respondents except to Petitioner's statement of facts and law.

The record in the Federal Action shows that the Motions to Dismiss and Motions for Summary Judgment were based, in part, on purely legal arguments, and were supported by Affidavits of individuals with direct personal knowledge of a variety of regulatory investigations and enforcement actions taken against Hydro-Vac. Petitioner opposed these Motions with his own Affidavit, Affidavits of two former Hydro-Vac employees and voluminous documentary evidence which was neither authenticated nor explained by any witness under oath. From the commencement of this action on August 26, 1991, to the entry of the Order dismissing the case on August 10, 1992, neither Petitioner nor his counsel requested any voluntary discovery of any Defendant and never subpoenaed any witness for a deposition.

Among the allegations which are clearly contradicted by the record, Petitioner contends information was withheld from him in the Labor Action, which he claims affected the outcome in the Federal Action. (Petition at pp. 5-7, 9, 22). However, the information was not withheld; Petitioner simply did not ask for it (R. 25 at ¶¶ 11, 12).

Petitioner has initiated an incredible attack on U.S. District Judge Jarvis, claiming Judge Jarvis' Memorandum Opinion of

August 10, 1992, is fraudulent and that there is no ". . . evidence whatsoever to even remotely support . . . " a statement to the effect that Petitioner's Allegations "were groundless." (Petition at p. 8, 11-12, 20). Petitioner has either forgotten or chosen to ignore the plain substance of the Affidavit of Guy Moose (R. 25) in which Moose describes five investigations of Hydro-Vac by Moose's office which occurred between September 20, 1990, and December 21, 1990, some initiated by complaints from Petitioner. Petitioner's allegations generally involved claims that Hydro-Vac was illegally disposing of hazardous waste. These investigations showed respectively, ". . . samples were taken at that time which ultimately revealed that all samples registered below regulatory levels with regard to E.P. toxicity tests or TCLP Extract Tests"; "this allegation was investigated on the same day and found to be without substance," and "as a result of the allegations made by Oliver on December 21st, *another* investigation was made of HVSI's installation and *again* it was found that Mr. Oliver's allegations were *groundless*." (R. 25, ¶¶ 6-9) (Emphasis added). Judge Jarvis' finding is clearly and unequivocally supported by the record in this action.

ARGUMENT

Standard of Review

The leading case on the scope of review of the denial of the Motion based upon Fed. R. Civ. P. 60(b) is *Browder v. Dept. of Corrections*, 434 U.S. 257, 98 S. Ct. 56 (1978). There, the Court ruled that an appeal from the denial of a Motion pursuant to Rule 60(b) does not bring up the underlying judgment and may be reviewed only for abuse of discretion. *See* 434 U.S. at 263, n.7, 98 S. Ct. at 560, n.7.

The Court of Appeals for the Sixth Circuit has held ". . . in reviewing the denial of a Rule 60(b) Motion, we are limited to determining whether the district court abused its discretion in

denying the Motion." *Windsor v. U.S. Dept. of Justice*, 740 F.2d 6, 7 (6th Cir. 1984). Furthermore, reviewing courts ". . . may not consider the merits of the underlying judgment." *Windsor*, 740 F.2d at 7 (6th Cir. 1984). *See also Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991) and *Amerinational Industries, Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991).

The only matter properly before this Court is whether or not the district court abused its discretion in denying Petitioner's Motion to Set Aside Orders, with its supporting papers, under Fed. R. Civ. P. 60(b), because said Motion was untimely or because Petitioner failed to satisfy the burden of establishing that fraud was perpetrated on or by the court.

1. Petitioner's appeal is untimely under Fed. R. Civ. P. 60(b)(3).

Petitioner's Fed. R. Civ. P. 60(b) Motion to Set Aside Orders was untimely. Because the Motion was untimely, the district court was correct in denying the Motion and the Circuit Court of Appeals was correct in affirming that denial.

Fed. R. Civ. P. 60(b)(3) allows a court, upon motion, to relieve a party from a final judgment obtained by fraud, misrepresentation or other misconduct of an adverse party. The rule further provides "the motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order, or proceeding is entered or taken." Because the Motion to Set Aside Orders was filed more than four years after entry of a final judgment in the trial court, it was untimely and was properly denied.

2. Petitioner's Motion pursuant to the savings clause of Fed. R. Civ. P. 60(b), was unsupported by evidence of fraud on or by the court and the Motion was properly denied.

If Petitioner's Motion is treated as an "an independent action" to "set aside a judgment for fraud upon the court", the district

court properly denied the Motion and the Circuit Court of Appeals properly affirmed that action.

Fed. R. Civ. P. 60(b) provides, in pertinent part, that "this rule does not limit the power of the court to entertain an independent action . . . to set aside a judgment for fraud upon the court." The district court was correct in denying the Motion under this "savings clause". As noted in 11 C. Wright and A. Miller, Federal Practice and Procedure § 2860, ". . . the burden of proof of fraud is on the moving party and that fraud must be established by clear and convincing evidence. Further, the fraud must have prevented the moving party from fully and fairly presenting his case." Petitioner has failed to meet this burden. Petitioner's Motion and supporting exhibits failed to present clear and convincing evidence of fraud; no such evidence was presented in the district court in response to the Motions to Dismiss and for Summary Judgment, and none was presented in his Motion to Set Aside Orders. Furthermore, there is no evidence that any fraud prevented Petitioner from "fully and fairly presenting his case," as virtually every document Petitioner cites as evidence of either alleged wrongdoing or alleged fraud by any party or counsel, is a part of the record in this case and is a public record of investigations of and enforcement actions against Hydro-Vac.

The topic of fraud on the court under this savings clause is discussed generally at 11 C. Wright and A. Miller, Federal Practice and Procedure § 2870. The concept of what constitutes fraud upon the court has been difficult for courts to articulate. No single definition has been sufficiently stated by any particular court. The case most commonly cited in this context is *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997 (1944). In that case, an attorney for Hartford-Empire, intended to mislead the court by having an article concerning a new invention or process published under the name of a supposedly disinterested third person, when, in fact, the attorney wrote the article as part of a plan and scheme to obtain a patent for the invention/process. During

patent litigation, the patent was upheld and Hazel-Atlas was ordered to pay substantial royalties to Hartford-Empire. Several years after entry of the judgment, Hazel-Atlas established by sworn testimony that the published article, which was relied upon by the patent office, the district court, and the court of appeals in the underlying patent litigation, had not been authored by its purported author, but rather had been written by the attorney for Hartford-Empire. In this case, the Court had no difficulty setting aside the original judgment on equitable grounds.

Appellate courts have recognized a requirement that the underlying judgment be obtained by means which are "manifestly unconscionable" in order for fraud to be a grounds setting aside a judgment. *See Hines v. Royal Indemnity Co.*, 253 F.2d 111, 113 (6th Cir. 1958), citing *Hazel-Atlas Glass Co.* Courts have also required that there be ". . . a showing of at least a reckless disregard for the truth." *United States v. Twitty*, 44 F.3d 410, 413 (6th Cir. 1995).

A clear expression of these requirements is in a case from another circuit, *DeVito v. Fidelity and Deposit Company of Maryland*, 361 F.2d 936 (7th Cir. 1966). There, the court noted

> . . . conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud, much less to carry the burden of resolving such issue.

361 F.2d at 938. Neither Petitioner's Motion nor his supporting papers satisfied these standards.

Notwithstanding Petitioner's allegations and claims of some kind of international conspiracy to "cover up" alleged hazardous waste dumping, all of his information which shows any

environmental wrongdoing by Hydro-Vac comes from public record of regulatory investigations and enforcement actions taken against Hydro-Vac. Fact and logic provide no support for Petitioner's allegations of a conspiracy.

Finally, it is important to note that Petitioner's Motion to Set Aside Orders under Fed. R. Civ. P. 60 was unsupported by sworn testimony containing facts supporting Petitioner's allegations.

It is apparent from this Petition that everyone who has disagreed with Petitioner's factual or legal analysis or perception has become a co-conspirator. In Petitioner's view, every regulator (state and federal), every judge (state and federal), and every elected or appointed official (state and federal), who disagreed with Petitioner, became co-conspirators to violate his civil rights and pollute and poison the people of North America and the world.

REASONS FOR DENYING THE WRIT

The Petition contains incomplete portions of multiple actions, and refers to many documents which are not appropriately authenticated supported by sworn testimony. Petitioner's Motion to Set Aside Orders in the Trial Court was not supported by properly authenticated records or sworn testimony supporting any of his claims. Petitioner has failed to demonstrate that "an United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" as required by Sup. Ct. R. 10. Petitioner has failed to establish any basis for relief from the Trial Court Orders pursuant to Fed. R. Civ. P. 60.

CONCLUSION

Respondents submit the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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